A

KUMARAN SUPPIAH

v.

DATO' NOH HJ OMAR & ANOR

B

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
ALAUDDIN MOHD SHERIFF FCJ
AUGUSTINE PAUL FCJ
[CRIMINAL APPEAL NO: 05-38-2006 (J)]

C

22 SEPTEMBER 2006

PREVENTIVE DETENTION: *Detention order - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Application for habeas corpus - Whether detention order made under*

D

s. 4(1) Ordinance could be made to take effect on a date subsequent to date on which it was made - Whether amounted to a breach - Whether subject to judicial review - Validity of detention order

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Detention under Emergency (Public Order and Prevention of Crime)*

E

Ordinance 1969 - Whether detention order made under s. 4(1) Ordinance could be made to take effect on a date subsequent to date on which it was made - Whether amounted to a breach - Whether subject to judicial review - Validity of detention order

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The appellant was ordered to be detained for a period of two years with effect from 26 December 2004 pursuant to a detention order made under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('Ordinance') on 17 December 2004. He filed a writ of *habeas corpus* in the High Court

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to secure his release and the subsequent refusal of the application resulted in this appeal by him. The only issue for determination was whether a detention order made under s. 4(1) of the Ordinance could be made to take effect on a date subsequent to the date on which it was made.

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Held (allowing the appeal)
Per Augustine Paul FCJ:

(1) The decision to detain a person for a specified period under

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s. 4(1) of the Ordinance is, without any doubt, a matter dealing with the discretion of the Minister and cannot be subject to judicial review pursuant to s. 7C(1) of the Ordinance. Similarly, the making of a detention order with a

delayed date of commencement is again a decision made by the Minister in the exercise of his discretion and thus cannot be subject to judicial review. However, the need to explain a delay in the date of commencement of a detention order is a constituent part of s. 4(1) of the Ordinance. It is a condition precedent to the making of a detention order in such a situation and there must, therefore, be in existence an explanation in such cases before the making of the detention order. It must be observed that the sufficiency of the explanation cannot be the subject of judicial inquiry as it is a matter within the discretion of the Minister. That, however, cannot be said of the availability of the explanation itself at the time of the making of the detention order. As the explanation is not the decision itself but only a part of the decision-making process, it is a matter of procedure and a very significant one at that. Since it is a condition precedent to the making of the decision by the Minister to have a delayed date of commencement of the detention order, it is a procedural requirement governing such decision. The question of whether this requirement has been complied with is thus subject to judicial review and since no explanation had been offered in this case for the delay in the commencement of the detention order, this amounted to non-compliance with a procedural requirement governing the making of the detention order. The order was, therefore, invalid. (para 8)

Bahasa Malaysia *translation of headnotes*

Perayu telah dikenakan tahanan untuk tempoh dua tahun bermula 26 Disember 2004 berdasarkan satu perintah tahanan bertarikh 17 Disember 2004 yang dibuat di bawah s. 4(1) Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 ('Ordinan'). Perayu memfail writ *habeas corpus* di Mahkamah Tinggi bagi pembebasannya, dan merayu ke mahkamah ini apabila permohonannya itu ditolak. Satu-satunya isu yang berbangkit adalah sama ada perintah tahanan yang dibuat di bawah s. 4(1) Ordinan boleh dikuatkuasakan pada satu tarikh lain selepas perintah tersebut dibuat.

Diputuskan (membenarkan rayuan)
Oleh Augustine Paul HMP:

(1) Keputusan untuk menahan seseorang untuk tempoh tertentu di bawah s. 4(1) Ordinan, tidak syak lagi, adalah satu perkara yang menyentuh budibicara Menteri dan tidak tertakluk kepada semakan kehakiman di bawah s. 7C(1) Ordinan. Begitu juga, pengeluaran perintah tahanan dengan tarikh kuatkuasa yang dilewatkan adalah satu keputusan yang dibuat oleh Menteri dalam pelaksanaan kuasa budibicaranya dan tidak tertakluk kepada semakan kehakiman. Bagaimanapun, keperluan untuk menjelaskan tentang kelewatan tarikh kuatkuasa sesuatu perintah tahanan adalah sebahagian dari kehendak s. 4(1) Ordinan. Ia merupakan satu syarat duluan kepada pengeluaran perintah tahanan seperti itu, dan penjelasan tersebut harus dibuktikan wujud sebelum perintah tahanan sedemikian dibuat. Perlu disedari bahawa cukup atau tidak cukupnya penjelasan berkenaan tidak boleh tertakluk kepada semakan kehakiman kerana itu termasuk dalam budibicara Menteri. Namun, soal sama ada penjelasan wujud atau tidak sewaktu perintah tahanan dibuat tidak termasuk dalam perkara budibicara Menteri. Oleh kerana penjelasan bukan sebahagian dari intipati keputusan tetapi hanyalah sebahagian dari proses membuat keputusan, maka ia adalah suatu hal prosedur, malah suatu hal prosedur yang amat penting. Juga, oleh kerana menjadi satu syarat duluan kepada pembuatan keputusan Menteri bahawa ia harus mengandungi tarikh kuatkuasa tertunda perintah tahanan, maka ia merupakan satu kehendak prosedur yang mengawalselia keputusan tersebut. Oleh itu, persoalan sama ada keperluan ini sudah dipatuhi adalah tertakluk kepada semakan kehakiman, dan, memandangkan tidak terdapat penjelasan mengapa kuatkuasa perintah tahanan telah dilewatkan, maka ia gagal mematuhi kehendak prosedur yang mengawalselia pembuatan perintah tahanan tersebut. Perintah, dengan itu, adalah tak sah.

Case(s) referred to:
Badri Prasad v. Ram Narain Singh AIR [1939] All 157 ***(refd)***
Bidya Deb Barma v. District Magistrate, Tripura AIR [1969] SC 323 ***(refd)***
Ex parte Austco Pty Ltd [1985] 2 QD R 1 ***(refd)***
Kam Teck Soon v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2003] 1 CLJ 225 FC ***(refd)***

Muhammad Jailani Kasim v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2006] 4 CLJ 687 FC ***(foll)***
R v. Inspector of Taxes, Ex parte Clarke [1971] 3 WLR 425 ***(refd)***
Re Datuk James Wong Kim Min [1976] 2 MLJ 245 ***(refd)***
Re Tan Boon Liat [1976] 2 MLJ 83 ***(refd)***
Re Tan Boon Liat [1977] 2 MLJ 108 ***(refd)***
K Salim v. The State of West Bengal AIR [1975] SC 602 ***(refd)***
Tai Choi Yu v. Government of Malaysia [1994] 2 CLJ 174 SC ***(refd)***
Tan Hoon Seng v. Minister for Home Affairs, Malaysia & Anor [1990] 1 CLJ 423; [1990] 1 CLJ (Rep) 271 SC ***(refd)***
The Reverend Thomas Pelhma Dales' case [1881] 6 QBD ***(refd)***
Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan [2006] 4 CLJ 703 FC ***(refd)***

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, s. 11C(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 7C(1)
Interpretation Acts 1948 and 1967, s. 54(2)

For the appellant - Gobind Singh Deo; M/s Karpal Singh & Co
For the respondents - Najib Zakaria

[Appeal from High Court, Johor Bahru; Criminal Application No: MT3-44-64-2005]

Reported by Suresh Nathan

JUDGMENT

Augustine Paul FCJ:

[1] The only issue for determination in this appeal is whether a detention order made under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance") can be made to take effect on a date subsequent to the date on which it was made.

[2] The appellant was ordered to be detained for a period of two years with effect from 26 December 2004 pursuant to a detention order made under s. 4(1) of the Ordinance on 17 December 2004. He filed a writ of *habeas corpus* in the High Court to secure his release. The application was refused and this appeal is by him.

[3] Before us learned counsel argued that the detention order is invalid as it has been made to take effect on a date subsequent to the date on which it was made. He said that it must be made to take effect from the date it was made. This, he said, is clear from the language of s. 4(1) of the Ordinance which reads as follows:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that person be detained for any period not exceeding two years.

Learned counsel contended that the period of detention must commence on the date when the Minister is satisfied of the need to make a detention order. In his submission the learned Deputy Public Prosecutor said that there is nothing in s. 4(1) of the Act to indicate the date of commencement of the detention order. In support he referred to the judgment of the (then) Supreme Court in *Tan Hoon Seng v. Minister for Home Affairs, Malaysia & Anor* [1990] 1 CLJ 423; [1990] 1 CLJ (Rep) 271 where Hashim Yeop Sani CJ (Malaya) said:

> The power of the Minister to make a detention order under the Act is conferred by s 6(1) of the Act. The power under s. 6(1) of the Act is expressly stated in the following terms, that is to say that whenever the Minister after considering the report of investigation and the report of the inquiry officer is satisfied that a person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order 'direct that such person be detained for a period not exceeding two years **from the date of such order**'. (emphasis added.)

> The Act was passed by Parliament in 1985. Prior to the passing of the Act, there were similar statutory powers of preventive detention in existence, namely, the respective provisions in the Internal Security Act 1960 and the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

In s. 8(1) of the Internal Security Act 1960, the power to order detention or restriction of persons is expressed in the following terms, that is to say that if the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services or to the economic life of Malaysia, he may make a detention order 'directing that that person be detained for **any period not exceeding two years**'. (emphasis added.)

In the Emergency (Public Order and Prevention of Crime) Ordinance 1969, there is a similar power of detention contained in s 4(1) thereof where if the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order 'directing that that person be detained for **any period not exceeding two years**. (emphasis added.)

It can be seen very clearly that the later law, that is the Act (of 1985), deviated from the previous two legislations on how the period of two years of detention shall be calculated.

The addition of the words 'from the date of such order' must bear some significant meaning. It is clear from those words that the material date for the commencement of the detention is the date when the order is made and signed by the Minister. On this construction, the period of two years must be calculated from the date that the order was made and signed by the Minister and not any other date.

It is not permissible under s. 6(1) of the Act for the Minister to specify a different date from the date of the order for the commencement of the detention unlike in the case of the previous two legislations where the Minister may from the language of the relevant provisions direct that a person be detained for a period not exceeding two years from a date as may be specified by the Minister.

In other words, the words 'from the date of such order' in s. 6(1) of the Act must mean what they say, that is from the date that the order is made and signed.

> It is to be observed that the legislature did not use words like 'from the date in such order' or 'from the date **as may be specified** in such order' for that would have given the power to the Minister to specify a different date from the date of the order. (emphasis added.) The statute may even be silent on the date of commencement as in the case of the two other legislations referred to earlier.

This passage was adopted by this court in *Kam Teck Soon v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2003] 1 CLJ 225. The learned Deputy Public Prosecutor then referred to the preamble to the Act which reads as follows:

> AND WHEREAS the Yang di-Pertuan Agong is satisfied that immediate action is required for securing public order, the suppression of violence and the prevention of crimes involving violence;

He then referred to *Re Tan Boon Liat* [1976] 2 MLJ 83 where it was held that when the enacting part of a statute is explicit and unambiguous the preamble cannot be resorted to in order to control, qualify or restrict it. Thus, he said, as s. 4(1) of the Ordinance is clear in its meaning the preamble cannot be resorted to in the interpretation of the section.

[4] In our view the language of s. 4(1) of the Ordinance is clear in its intent and purport. In substance it states that when the Minister is satisfied of the existence of the conditions enumerated therein he shall make a detention order directing that the person be detained for any period not exceeding two years. There is no indication, expressly or by implication, that the date of commencement of the detention order must be the same as the date of making it. The section is silent on this requirement as observed by the (then) Supreme Court in *Tan Hoon Seng v. Minister for Home Affairs, Malaysia & Anor* [1990] 1 CLJ 423; [1990] 1 CLJ (Rep) 271. It is a rule of construction that where the terms of an enactment are clear, precise and unambiguous it must be applied and enforced according to its plain meaning and it is not the function of the court to speculate as to what might have been in the mind of the enacting authority as it may appear to the court from the preamble or otherwise (see *Badri Prasad v. Ram Narain Singh* AIR [1939] All 157).

[5] The fact that s. 4(1) of the Ordinance is silent with regard to the time within which the detention order must be made to take effect does not mean that the Minister has a complete discretion in determining the date. Where no time has been prescribed for the doing of an act in a statutory provision it must be read with s. 54(2) of the Interpretation Act 1967 ("s. 54(2)") which reads as follows:

> Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

In cases such as *Tai Choi Yu v. Government of Malaysia* [1994] 2 CLJ 174 and *Ex parte Austco Pty Ltd* [1985] 2 QD R 1 it was observed that what will be "all convenient speed" will depend upon the facts and peculiar circumstances of each case. As s. 4(1) of the Ordinance read with s. 54(2) deals with preventive detention it must be strictly construed. Thus the requirement as to the time within which a detention order must be made to take effect must be the same or as close as possible to the date of making of the detention order. Where both the dates do not coincide the delay must be explained. This is in line with the rule that any delay in a matter that must be done within a reasonable time must be satisfactorily explained (see *Bidya Deb Barma v. District Magistrate, Tripura* AIR [1969] SC 323; *SK Salim v. The State of West Bengal* AIR [1975] SC 602; *R v. Inspector of Taxes, Ex parte Clarke* [1971] 3 WLR 425). The necessity for such an explanation must therefore be read as a constituent part of s. 4(1) of the Ordinance. In commenting on the need to comply with statutory requirements in cases of preventive detention Lee Hun Hoe CJ (Borneo) said in *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 at p 251:

> Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith.

A Where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184.

B One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, Article 5(1) of the Constitution guarantees that 'no person shall be deprived of his ... liberty except in accordance with the law.' If this constitutional guarantee C is to have any real meaning at all, then it is imperative that the courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.

The case of *The Reverend Thomas Pelhma Dales' case* [1881] 6 QBD cited in *Re Tan Boon Liat* [1977] 2 MLJ 108 makes it clear that D the steps taken to detain a person must be entirely regular. Thus where there is a delay in the date of commencement of a detention order the requirement of an explanation for the delay must have been complied with. A failure to provide any reason to explain the delay in the effective date of a detention order will thus E mean that there has been a breach of s. 4(1) of the Ordinance. As the detention order in this case was made on 17 December 2004 its date of commencement on 26 December 2004 cannot be said to have been done with all convenient speed. Thus the respondents must show that the delay in the date of F commencement of the detention order has been explained.

[6] None of the affidavits affirmed by the respondents contain any explanation for the delay. The Deputy Minister of Internal Security made an attempt to do so in para. 8 of his affidavit. It G reads as follows:

> Merujuk kepada afidavit pemohon saya ingin menegaskan bahawa penahanan pemohon yang bertarikh diantara 17.12.2004 hingga 26.12.2004 adalah sah kerana ia mematuhi peraturan dibawah akta tersebut.

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This is only an explanation for the detention of the appellant from 17 December 2004 to 26 December 2004. It does not, however, explain why the detention order was made to take effect from 26 December 2004. This is particularly significant as the fact that the I detention order has been made can only mean that inquiries into the activities of the appellant have been completed and the legality

of his continued detention thereafter is questionable. The respondents have therefore failed to explain the delay in the date of commencement of the detention order. This is a breach of s. 4(1) of the Ordinance.

[7] The resultant matter for consideration is whether the breach of s. 4(1) of the Ordinance in failing to explain the delay is one that is subject to judicial review. The scope of judicial review under the Ordinance is governed by s. 7C(1) which reads as follows:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Ordinance, save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision.

This section is in *pari materia* with s. 11C(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 which was considered by this court in *Muhammad Jailani bin Kasim v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687 in the following words:

> The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 3 MLJ 28; *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v. Inspector General of Police* [1993] 1 MLJ 65. It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However it must be observed that the power of the Court to intervene is limited to only matters of compliance with procedural requirements by section 11C(1) of the Act which reads as follows:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order. The section only refers to a question of compliance with procedural requirements without subjecting it to any prejudice having been suffered. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively, by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is mandatory or directory in nature.

This passage was adopted by this court in *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan* [2006] 4 CLJ 703.

[8] The decision to detain a person for a specified period under s. 4(1) of the Ordinance is, without any doubt, a matter dealing with the discretion of the Minister and so it cannot be subject to judicial review pursuant to s. 7C(1) of the Ordinance. Similarly the making of a detention order with a delayed date of commencement is again a decision made by the Minister in the exercise of his discretion and thus cannot be subject to judicial review. However, as stated earlier, the need to explain a delay in the date of commencement of a detention order is a constituent part of s. 4(1) of the Ordinance. It is a condition precedent to the making of a detention order in such a situation. There must therefore be in existence an explanation in such cases before the making of the detention order. It must be observed that the sufficiency of the explanation cannot be the subject of judicial

inquiry as it is a matter within the discretion of the Minister. That, however, cannot be said of the availability of the explanation itself at the time of the making of the detention order. As the explanation is not the decision itself but only a part of the decision making process it is a matter of procedure, and, a very significant one. Since it is a condition precedent to the making of the decision by the Minister to have a delayed date of commencement of the detention order it is a procedural requirement governing such decision. The question of whether this requirement has been complied with is thus subject to judicial review. As explained earlier no explanation has been offered in this case for the delay in the commencement of the detention order. This amounts to non-compliance with a procedural requirement governing the making of the detention order. The order is therefore invalid.

[9] Accordingly, we allow the appeal.